

**Exhibit 2**

**Exhibit 2**

**To:** Einstein Cosmetics Ltd (jfsicotte@turner-law.com)  
**Subject:** TRADEMARK APPLICATION NO. 78903602 - EINSTEIN LIP THERAPY - EC 1003  
**Sent:** 9/8/2006 3:12:58 PM  
**Sent As:** ECOM107@USPTO.GOV  
**Attachments:** Attachment - 1  
Attachment - 2  
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**UNITED STATES PATENT AND TRADEMARK OFFICE**

**SERIAL NO:** 78/903602

**APPLICANT:** Einstein Cosmetics Ltd

**CORRESPONDENT ADDRESS:**

JOHN F. SICOTTE  
LAW OFFICE OF LAWRENCE J. TURNER  
9200 W SUNSET BLVD STE 701  
LOS ANGELES, CA 90069-3602

**\*78903602\***

**RETURN ADDRESS:**

Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

**MARK:** EINSTEIN LIP THERAPY

**CORRESPONDENT'S REFERENCE/DOCKET NO:** EC 1003

**CORRESPONDENT EMAIL ADDRESS:**

jfsicotte@turner-law.com

Please provide in all correspondence:

1. Filing date, serial number, mark and applicant's name.
2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and e-mail address.

## OFFICE ACTION

**RESPONSE TIME LIMIT:** TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE MAILING OR E-MAILING DATE.

**MAILING/E-MAILING DATE INFORMATION:** If the mailing or e-mailing date of this Office action does not appear above, this information can be obtained by visiting the USPTO website at <http://tarr.uspto.gov/>, inserting the application serial number, and viewing the prosecution history for the mailing date of the most recently issued Office communication.

Serial Number 78/903602

The assigned trademark examining attorney has reviewed the referenced application and has determined the following:

### **Section 2(d) - Likelihood of Confusion Refusal**

Registration of the proposed mark is refused because of a likelihood of confusion with the marks in U.S. Registration Nos. 1318877 and 1496509. Trademark Act Section 2(d), 15 U.S.C. §1052(d); TMEP §§1207.01 *et seq.* See the enclosed registrations.

Taking into account the relevant *Du Pont* factors, a likelihood of confusion determination in this case involves a two-part analysis. First, the marks are compared for similarities in appearance, sound, connotation and commercial impression. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). Second, the goods or services are compared to determine whether they are similar or related or whether the activities surrounding their marketing are such that confusion as to origin is likely. *In re National Novice Hockey League, Inc.*, 222 USPQ 638 (TTAB 1984); *In re August Storck KG*, 218 USPQ 823 (TTAB 1983); *In re Int'l Tel. and Tel. Corp.*, 197 USPQ 910 (TTAB 1978); *Guardian Prods. Co., v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978); TMEP §§1207.01 *et seq.*

### **I. Similarities of the Marks**

The marks are compared for similarities in sound, appearance, meaning or connotation. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). Similarity in any one of these elements may be sufficient to find a likelihood of confusion. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1536 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1043 (TTAB 1987); *In re Mack*, 197 USPQ 755 (TTAB 1977); TMEP §1207.01(b).

Applicant's mark is EINSTEIN LIP THERAPY. Registrant's marks are LIP THERAPY. The mere addition of a term to a registered mark does not obviate the similarity between the marks nor does it overcome a likelihood of confusion under Section 2(d). *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) ("GASPAR'S ALE and "JOSE GASPAR GOLD"); *Coca-Cola Bottling Co. v. Joseph E. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (C.C.P.A. 1975) ("BENGAL" and "BENGAL LANCER"); *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406 (C.C.P.A. 1967) ("THE LILLY" and "LILLI ANN"); *In re El Torito Rests. Inc.*, 9 USPQ2d 2002 (TTAB 1988) ("MACHO" and "MACHO COMBOS"); *In re United States Shoe Corp.*, 229 USPQ 707 (TTAB 1985) ("CAREER IMAGE" and "CREST CAREER IMAGES"); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985) ("CONFIRM" and "CONFIRMCELLS"); *In re Riddle*, 225 USPQ 630 (TTAB 1985) ("ACCUTUNE" and "RICHARD PETTY'S ACCU

TUNE”); *In re Cosvetic Laboratories, Inc.*, 202 USPQ 842 (TTAB 1979) (“HEAD START” and “HEAD START COSVETIC”); TMEP §1207.01(b)(iii).

In this manner, the marks create the same overall commercial impression.

## **II. Comparison of the Goods**

The goods of the parties need not be identical or directly competitive to find a likelihood of confusion. Instead, they need only be related in some manner, or the conditions surrounding their marketing are such that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the goods come from a common source. *On-line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984); *Guardian Prods. Co., Inc. v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978); *In re Int'l Tel. & Tel. Corp.*, 197 USPQ 910 (TTAB 1978); TMEP §1207.01(a)(i).

Applicant's goods are “lip balm; lip cream.” Registrant's goods are “non-medicated lip balm” and “medicated lip ointment.” The goods are identical and highly related. Attached are five copies of printouts from the USPTO X-Search database, which show third-party registrations of marks used in connection with the same or similar goods as those of applicant and registrant in this case. These printouts have probative value to the extent that they serve to suggest that the goods listed therein, namely lip balm and lip ointment, are of a kind that may emanate from a single source. *See In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-1218 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, 1470 at n.6 (TTAB 1988).

Any doubt regarding a likelihood of confusion is resolved in favor of the prior registrant. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); TMEP §§1207.01(d)(i).

Accordingly, the examining attorney refuses registration.

Although the trademark examining attorney has refused registration, applicant may respond to the refusal to register by submitting evidence and arguments in support of registration. If applicant chooses to respond to the refusal to register, then applicant must also respond to the following requirements.

### **Disclaimers**

Applicant must disclaim the descriptive wording “LIP” apart from the mark as shown because it merely describes a feature of the applicant's goods. Trademark Act Section 6, 15 U.S.C. §1056; TMEP §§1213 and 1213.03(a). Please see the attached dictionary definition.

The computerized printing format for the Office's *Trademark Official Gazette* requires a standardized format for a disclaimer. TMEP §1213.08(a)(i). The following is the standard format used by the Office:

No claim is made to the exclusive right to use “LIP” apart from the mark as shown.

*See In-re Owatonna Tool Co.*, 231 USPQ 493 (Comm'r Pats. 1983).

A disclaimer does *not* remove the disclaimed matter from the mark. It is simply a statement that the applicant does not claim exclusive rights in the disclaimed wording or design apart from the mark as shown in the drawing.

**Advisory**

TEAS PLUS APPLICANTS MUST SUBMIT DOCUMENTS ELECTRONICALLY OR SUBMIT FEE: TEAS Plus applicants should submit the following documents using the Trademark Electronic Application System (TEAS) at <http://www.uspto.gov/teas/index.html>: (1) written responses to Office actions; (2) preliminary amendments; (3) changes of correspondence address; (4) changes of owner's address; (5) appointments and revocations of attorney; (6) amendments to allege use; (7) statements of use; (8) requests for extension of time to file a statement of use, and (9) requests to delete a §1(b) basis. If any of these documents are filed on paper, they must be accompanied by a \$50 per class fee. 37 C.F.R. §§2.6(a)(1)(iv) and 2.23(a)(i). Telephone responses will not incur an additional fee. NOTE: In addition to the above, applicant must also continue to accept correspondence from the Office via e-mail throughout the examination process in order to avoid the additional fee. 37 C.F.R. §2.23(a)(2).

If applicant has questions about its application or needs assistance in responding to this Office action, please telephone the assigned trademark examining attorney directly at the number below.

/Steven Jackson/

Steven W. Jackson

Trademark Attorney

Law Office 107

Phone: 571-272-9409

Fax: 571-273-9107

**HOW TO RESPOND TO THIS OFFICE ACTION:**

- **ONLINE RESPONSE:** You may respond using the Office's Trademark Electronic Application System (TEAS) Response to Office action form available on our website at <http://www.uspto.gov/teas/index.html>. If the Office action issued via e-mail, you must wait 72 hours after receipt of the Office action to respond via



TEAS. **NOTE: Do not respond by e-mail. THE USPTO WILL NOT ACCEPT AN E-MAILED RESPONSE.**

- **REGULAR MAIL RESPONSE:** To respond by regular mail, your response should be sent to the mailing return address above, and include the serial number, law office number, and examining attorney's name.

**NOTE: The filing date of the response will be the *date of receipt in the Office*, not the postmarked date.**  
To ensure your response is timely, use a certificate of mailing. 37 C.F.R. §2.197.

**STATUS OF APPLICATION:** To check the status of your application, visit the Office's Trademark Applications and Registrations Retrieval (TARR) system at <http://tarr.uspto.gov>.

**VIEW APPLICATION DOCUMENTS ONLINE:** Documents in the electronic file for pending applications can be viewed and downloaded online at <http://portal.uspto.gov/external/portal/tow>.

**GENERAL TRADEMARK INFORMATION:** For general information about trademarks, please visit the Office's website at <http://www.uspto.gov/main/trademarks.htm>

**FOR INQUIRIES OR QUESTIONS ABOUT THIS OFFICE ACTION, PLEASE CONTACT THE ASSIGNED EXAMINING ATTORNEY SPECIFIED ABOVE.**

**Print: Sep 8, 2006**

**73468869**

**TYPED DRAWING**

**Serial Number**

73468869

**Status**

REGISTERED AND RENEWED

**Word Mark**

LIP THERAPY

**Standard Character Mark**

No

**Registration Number**

1318877

**Date Registered**

1985/02/12

**Type of Mark**

TRADEMARK

**Register**

PRINCIPAL

**Mark Drawing Code**

(1) TYPED DRAWING

**Owner**

Chesebrough-Pond's Inc. CORPORATION NEW YORK 33 Benedict Pl. Greenwich  
CONNECTICUT 06830

**Goods/Services**

Class Status -- ACTIVE. IC 005. US 018. G & S: Non-Medicated Lip  
Balm. First Use: 1984/02/16. First Use In Commerce: 1984/02/16.

**Disclaimer Statement**

No claim is made to the exclusive right to use "Lip", apart from the  
mark as shown.

**Filing Date**

1984/03/05

**Examining Attorney**

UNKNOWN

**Attorney of Record**

Kenneth Leonard



Print: Sep 8, 2006

73690798

**TYPED DRAWING**

**Serial Number**

73690798

**Status**

SECTION 8 & 15-ACCEPTED AND ACKNOWLEDGED

**Word Mark**

LIP THERAPY

**Standard Character Mark**

No

**Registration Number**

1496509

**Date Registered**

1988/07/19

**Type of Mark**

TRADEMARK

**Register**

PRINCIPAL

**Mark Drawing Code**

(1) TYPED DRAWING

**Owner**

UNILEVER SUPPLY CHAIN, INC. CORPORATION DELAWARE 1 JOHN STREET CLINTON  
CONNECTICUT 06413

**Goods/Services**

Class Status -- ACTIVE. IC 005. US 018. G & S: MEDICATED LIP  
OINTMENT. First Use: 1987/08/27. First Use In Commerce: 1987/08/27.

**Prior Registration(s)**

0151099;0319120;0333703;1318877;AND OTHERS

**Disclaimer Statement**

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "LIP" APART FROM THE  
MARK AS SHOWN.

**Filing Date**

1987/10/16

**Examining Attorney**

COFIELD, JULIA HARDY

**Attorney of Record**

**Print: Sep 8, 2006**

**73690798**

AURA PIEDRA

Print: Sep 8, 2006

74396821

**TYPED DRAWING**

**Serial Number**

74396821

**Status**

REGISTERED AND RENEWED

**Word Mark**

THE COLOR INSTITUTE

**Standard Character Mark**

No

**Registration Number**

1899523

**Date Registered**

1995/06/13

**Type of Mark**

TRADEMARK

**Register**

PRINCIPAL

**Mark Drawing Code**

(1) TYPED DRAWING

**Owner**

Markwins International Corporation CORPORATION CALIFORNIA 22067  
FERRERO PARKWAY CITY OF INDUSTRY CALIFORNIA 91789

**Goods/Services**

Class Status -- ACTIVE. IC 003. US 001 004 006 050 051 052. G & S: cosmetics; namely, eyeshadow, blush, body powder, face powder, lipstick, lip color, lip gloss, eye pencils, nail polish and enamel, cosmetic compacts containing the above, eyeliners, mascara, eyebrow pencils, lipstick, lip liners, non medicated lip balms, makeup bases and foundations, skin moisturizers, face powders, compact face powder, rouge, blushers, facial creams, body creams, facial cleansing preparations, cleansing foams for face and body skin care, astringents for cosmetic use, skin toners, night creams, makeup removers, nail care preparations, nail polish, nail varnish, nail enamel, hair shampoo, hair conditioners, hair sprays, mousse, and perfumes, Ph balance fluids in the nature of lip ointment and lip gloss, and for face and body skin care. First Use: 1993/08/00. First Use In Commerce: 1993/08/00.

**Prior Registration(s)**

1701299

**Print: Sep 8, 2006**

**74396821**

**Disclaimer Statement**

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "COLOR" APART FROM THE MARK AS SHOWN.

**Filing Date**

1993/06/01

**Examining Attorney**

MILTON, PRISCILLA

**Attorney of Record**

Danton K. Mak

Print: Sep 8, 2006

75525821

**DESIGN MARK**

**Serial Number**

75525821

**Status**

SECTION 8 & 15-ACCEPTED AND ACKNOWLEDGED

**Word Mark**

MARKWINS

**Standard Character Mark**

No

**Registration Number**

2267289

**Date Registered**

1999/08/03

**Type of Mark**

TRADEMARK

**Register**

PRINCIPAL

**Mark Drawing Code**

(1) TYPED DRAWING

**Owner**

MARKWINS INTERNATIONAL CORPORATION CORPORATION CALIFORNIA 22067  
FERRERO PARKWAY CITY OF INDUSTRY CALIFORNIA 91789

**Goods/Services**

Class Status -- ACTIVE. IC 003. US 001 004 006 050 051 052. G & S:  
Cosmetics, namely, eyeshadow, blush, body powder, face powder,  
lipstick, lip color, lip gloss, eye pencils, nail polish and enamel,  
cosmetic compacts containing the above; eyeliners; mascara; eyebrow  
pencils; lipstick; lip liners; non medicated lip balms; makeup bases  
and foundations; skin moisturizers; face powders; compact face powder;  
rouge; blushers; facial creams; body creams; facial cleansing  
preparations; cleansing foams for face and body skin care;  
[astringents for cosmetic use;] skin toners; night creams; makeup  
removers; nail care preparations, namely, nail polish, nail varnish,  
nail enamel, and nail conditioners; hair shampoo; hair conditioners;  
hair sprays; [mousse;] perfumes, [pH balance fluids in the nature of  
lip ointment and lip gloss,] and toners for face and body skin care;  
and cosmetic kits containing one or more of the above packaged  
together. First Use: 1996/09/01. First Use In Commerce: 1996/09/01.

**Filing Date**

**Print: Sep 8, 2006**

**75525821**

1998/07/27

**Examining Attorney**  
WEST, CAROLINE